IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Criminal Appellate Jurisdiction

CRIMINAL APPEAL NO. 181 of 1994

Hindurao Nivruti Shewale ...Appellant
(Orig.Accused)

V/s

State of Maharashtra ... Respondent
(Orig.Complainant)

Shri M.S.Mohite for Appellant

Smt. V.R.Bhosale,APP for Respondent

CORAM : S.S.PARKAR AND
S.R.SATHE,JJ.

DATED:10th Sept. 2004

ORAL JUDGMENT :- (Per S.R.SATHE,J.)

1. The appellant-original accused in Sessions Case No.8 of 1992 has preferred this appeal against the judgment and order passed by the Court of 3rd Additional Sessions Judge, Satara whereby the accused was convicted for the offence punishable

under Section 302 of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.200/-.

2. The brief facts giving rise to this appeal are as under :

. The marriage of accused with deceased Kusum had taken place about 15 years prior to the date of incident which is 13-6-1991. Out of the said wedlock they have 3 children viz. Raju aged 12 years, Surekha aged about 10 years and Bhau aged about 6 years. After marriage accused and deceased started residing together at Shewalwadi. However thereafter the accused found that his wife Kusum had illicit relations with Raghunath, who was residing adjacent to the house of the accused. Accused had about 30 acres of land.He sold land admeasuring about 11 gunthas out of the same in the year 1989. This act of accused was not liked by his wife Kusum and on that count there was dispute between deceased Kusum and accused. Not only that but there also used to be quarrel between deceased Kusum and accused on account of Raghunath. When the accused sold the land admeasuring 11 gunthas, Kusum even issued a public notice and objected the transaction entered into by her husband. It is the prosecution case that since about 5 months prior to

the incident the accused had left his house and was residing at different places. On 10-6-1991 the accused returned home at Shewalwadi. On 13-6-1991 in the morning accused asked his daughter Surekha to take her younger brother Bhau to a barber for his hair cut. Accordingly Surekha and Bhau left home and they went to barber. The barber told them that he would come to Shewalwadi for that purpose. Naturally both of them returned to Shewalwadi. When they left home for going to barber the accused as well as deceased Kusum were at home. When they returned home, Surekha asked her father about her mother. On that accused told her that she has gone to their field. Surekha wanted to drink water and for that purpose she was about to enter the house but accused, did not allow her to enter the house and on the contrary he got annoyed and said that she should immediately go to field. Surekha and her younger brother Bhau therefore went to their field which was very near from the house. Having seen that her mother was not at the field, Surekha and Bhau returned home. At that time Surekha noticed that door of their house was latched from outside and accused was running towards east of the house. Surekha, therefore, opened the door and entered the house. At that time she noticed that her mother was lying there. She tried to awake her

by calling her but mother did not respond. She also noticed that there was no movement of her limbs. Naturally Surekha got frightened and went to her neighbour Kamal. She told Kamal that her mother is lying in the house and her father went running towards nala. Kamal, therefore, went to the house of accused and she also found that Kusum was lying and was unable to make any movement. She therefore, asked Surekha to go to her paternal aunt Balabai and inform her about the incident. Accordingly Balabai came to the spot and then she asked Surekha to go to her maternal uncle i.e. complainant Tanaji Jadhav. She therefore went to Tanaji Jadhav and informed him about the incident. Tanaji immediately went to the house of the accused. He saw the dead body of Kusum. When he made enquiry with Surekha, she narrated the entire incident to Tanaji. He, therefore, went to Karad Police station and lodged the Complaint Exh.19 at about 4-30 p.m. The Police registered the offence at C.R.No.128 of 1991 and API Abdul Karim Husein Shaikh proceeded to the place of offence. After reaching there, he drew the inquest panhcnama as well as spot panchanama and sent the dead body for post mortem. He also recorded the statements of wittiness and attached the clothes of the deceased. He tried to search the accused but accused was not

traced. The accused was found at Karad on 16-6-1991. API therefore arrested the accused. After completion of investigation he submitted the charge sheet against the accused for the offence punishable under Section 302 of IPC in the Court of J.M.F.C. Karad. Finding that accused is charge sheeted for the offence punishable under Section 302 of IPC which is exclusively triable by Sessions Court, he committed the case to Sessions Court, Satara. The 3rd Additional Sessions Judge, Satara framed charge Exh.5 against the accused for the offence punishable under section 302 of IPC. The charge was read over and explained to the accused. The accused pleading not guilty and claimed to be tried. From the questions put to the PWS as well as from the statement of accused recorded under Section 313 of Cri.P.C. it appears that the defence of the accused was of total denial.

4. In order to prove the guilt of the accused the prosecution examined as many as 9 witnesses, consisting of 2 panch witnesses viz. A.S.Jadhav and V.S.Suryavanshi, Exhibits 14 and 16 respectively, Circle Officer, G.R.Mahaparale, Exh.12, complainant T.B.Jadhav, exh.18, Dr.S.B.Shaikh, Exh.27, witness K.R.Shewale Exh.31, S.H.Shewale, Exh.33, B.L.jadhav, Exh.34 and A.P.I.

Shaikh, Exh.35. Prosecution also produced certain documents viz. Panchanama of the place of offence, Exh. 15, Panchanama of the arrest of accused, Exh.17, Inquest panchanama Exh.11, Post mortem notes Exh.28. The accused did not adduce any evidence.

5. After considering the evidence adduced by the prosecution, the learned Additional Sessions Judge came to the conclusion that the prosecution has proved the guilt of the accused beyond reasonable doubt. He therefore convicted the accused for the offence punishable under Section 302 of I.P.C. and punished him for a period of imprisonment of life.

6. The accused has challenged the above mentioned order in this appeal. Mr.M.S.Mohite,learned Advocate for the appellant accused has urged two points. Firstly, he submitted that prosecution case rests on the circumstantial evidence and as such it is necessary for the prosecution to adduce very cogent and convincing evidence to show that the accused alone has committed the alleged offence. Secondly, he canvassed before us that the prosecution case mainly rests on the evidence of child witness Surekha Shewale Exh.33 and as there is no corroboration to the evidence of child

witness, it is not safe to accept her testimony, particularly when it appears that she was under influence of her uncle i.e. complainant. According to him there was possibility of tutoring the child witness. He therefore, submitted that the order of conviction and sentence passed by the Additional Sessions Judge is not legal and correct. He therefore prayed that the appeal be allowed and the accused be acquitted.

7. As against this the learned A.P.P. supported the judgment and order passed by the Additional Sessions Judge by saying that in the instant case the prosecution had proved the motive and there was evidence with regard to last seen. the accused was absconding after the incident and as such the order passed by the learned Sessions Judge is correct.

8. It is not in dispute that marriage of accused and deceased Kusum had taken place about 15 years prior to the incident. Admittedly they have 3 children viz. Raju,Surekha and Bhau. It is also admitted that the relations between Kusum and accused were strained on account of accused selling their agricultural land as well as on account of accused having suspicion about the character of Kusum. He was suspecting that she was having

illicit relation with Raghunath. Admittedly since 5 months prior to the date of incident accused was not residing in the house but he had left the house and was staying at different places. It is also an admitted fact that on 13-6-1991 when witness Surekha had entered the house, she had seen her mother lying there. It is very clear from the evidence on record that the dead body of Kusum was found in the house on 13-6-1991 at about 9-00 a.m. to 9-30 a.m. when the dead body was sent for post mortem, Dr.Shaikh noticed following 5 injuries on the person of deceased Kusum (Exh.28)

1. Abrasion over thyroid cartilage on both side of centre, each measuring 1/2" x 1/4" to 1/8"

2. Abrasion over right cheek 1/4" x 1/4"

3. Abrasion over left Maxila, one inch lateral to left eye circular, 4" in circle

4. Abrasion on right side of neck middle at the level of thyroid 1" x 1/2".

5. Abrasion on right knee joint below pettalla laterly 1/2" x 1/4" direction above downward. All the above injuries were ante mortem.

. Doctor has opined that death of Kusum was caused by asphexya due to throttling. Thus from the medical evidence it is very clear that death of Kusum was homicidal. In fact it is no where even suggested by defence that death of Kusum was not homicidal.

9. The main and the material question is whether the death is caused at the hands of
the accused.

10. At the outset it may be mentioned that there is no eye witness to the incident and the case rests on the circumstantial evidence. Shri M.S.Mohite, learned Advocate for the accused has drawn our attention to a case - Sharad Birdhichand Sarda V/s State of Maharashtra - AIR 1984 SC 1622 and submitted that circumstances on which prosecution is relying in this case are not fully established by the prosecution and as such the order of conviction passed is illegal. The law regarding substantial evidence is well settled. All circumstances have to be established beyond doubt. The facts and circumstances so established should be consistent only with hypothesis of the

guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. Besides this, the circumstances must be of a conclusive nature and tendency and should exclude every possible hypothesis except the one to be proved. The chain of circumstances must be so complete which will not leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

11. The first circumstantial evidence against the accused is with respect to the 'last seen together'. For this, the prosecution is mainly relying on the testimony of witness Surekha the eldest daughter of accused (Exh.33). She is about 12 years of age. She has stated that when her father was residing in the house there used to be quarrel between her father and mother on account of Raghunath as well as on account of the fact that accused had sold their land. The accused had left the house for about 5 months prior to date of incident but he returned home on Monday i.e. 10-6-1991. Not only that but she has also stated that on 13-6-1991 when she and her brother left home, her parents were in the house. When she

asked accused about her mother, the accused told her that she has gone to their field. She wanted to enter the house for drinking water but accused did not allow her to do so and on the contrary got annoyed and kept his eyes wide open and told her that her mother has gone to their field. The witness Surekha and Bhau therefore went to their field. She has further stated that her mother was not in the field and so they returned home. At that time she noticed that door of the house was latched from outside. She also saw the accused running away from the said place. She therefore, entered the house and at that time she noticed that her mother was lying there. When she called her, there was no response. She also noticed that there were no movements of her limbs. She therefore immediately went to her neighbour i.e. witness Kamal -Exh.31 and informed her about the incident. The story of witness Surekha is corroborated on main aspect by witness Kamal Shewale. It is true that witness Kamal Shewale has stated that since after her marriage during the period of 3 months she had never seen accused in his house. Even then we find that the said witness has stated that on 13-6-1992 when Surekha made enquiry about her mother with accused, accused told them that she had gone to the field. It seems that during the cross

examination she has stated that she made such statement by identifying the voice of the accused. The question arises whether witness Kamal had in fact heard the voice of accused previously at any time and whether she was in a position to identify the said voice. While considering this question one has to bear in mind that it is not even the version of the accused that at no point of time Kamal had heard the voice of accused or that Kamal was not knowing the accused. We cannot ignore the fact that after all Kamal was the wife of cousin brother of accused. Moreover it has come in evidence of witness T.B. Jadhav Exh.18 that Kamal is daughter of Pandurang who happens to be the brother of Balabai. It is an admitted position that Balabai is the aunt of accused. So, it is not that relation between Kamal and accused came into existence because of her marriage with Raghunath. On the contrary it appears that they were related with each other in the manner mentioned above. Under such circumstances there is every possibility that witness Kamal must be knowing the accused and as a result of the same she was in a position to identify the voice of accused. Much is made about the fact that though it is tried to be suggested that when Surekha made enquiry with her father, Kamal had seen them or heard them and even then she

has deposed that she had not actually seen the accused. It is true that room of witness Kamal is adjacent to the room of accused and as a result of the same there was every possibility of Kamal seeing the accused but merely because she has not stated that on that day she had seen the accused at the house, we cannot jump to the conclusion that evidence given by Kamal is not true and correct. The evidence of Kamal is in fact not shaken or shattered in the cross examination. on the contrary as mentioned above it corroborates the story given by witness Surekha Exh.33.

12. From the evidence of Surekha it appears that her evidence has been recorded after giving her oath. The trial Judge noticed that witness was in a position to understand the santity of oath. So, it also shows that the said witness has that much maturity. It is tried to be suggested that witness Surekha must have been tutored by her uncle Tukaram. However, we cannot ignore the fact that there was in fact no sufficient time for Tukaram to tutor Surekha. On the contrary,one particular circumstance must be mentioned, In this case it is an admitted fact that complaint is lodged by Tanaji Jadhav, the brother of deceased Kusum on 13-6-1991 at about 4-30 p.m. It is clear from the evidence

on record that when he was informed about the incident he went to the house of accused at about 12-15 p.m. and when he asked Surekha as to what happened, Surekha narrated the entire story mentioned above to him. The same story or sequence of events have been mentioned by complainant in the complaint which is lodged at Phaltan Police Station. Considering these facts it is very clear that the complaint in this case must be said to have been lodged promptly. So, the prompt lodging of FIR in which there is clear mention of entire prosecution story clearly indicates that witness Surekha was not at all a got up witness. On the contrary, she was the most natural witness. So, whatever is deposed by her was in fact told by her to the complainant practically immediately after the incident. So we have no hesitation to hold that this is not a case of tutoring. In fact the trial Judge has also specifically observed that evidence of Surekha was found to be natural, probable and convincing. He had an opportunity to see the child witness while she was in the witness box, so due weightage has to be given to his opinion about the said witness. Shri M.S.Mohite, learned Advocate for the accused has drawn our attention to a case, Vadivelu Thevar V/s the State of Madras AIR 1957 SC 614, wherein Their Lordships

have observed that:

> i) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweigh the testimony of a number of other witnesses of indifferent character.
>
> ii) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

13. From the perusal of the above observations also it is very clear that there is no rule of law that conviction cannot be based on testimony of a single witness though on corroborated. It is also well settled that one credible witness may outweigh

number of other witnesses of indifferent character. In our opinion in the instant case the evidence of Surekha is absolutely cogent and convincing. There is nothing to indicate that she was tutored. Her evidence is also corroborated in two ways. Firstly she has deposed the facts at the earliest opportunity and that too within short time from the incident and it is reflected in the complaint Exh.19 and thereafter it is also corroborated by witness Kamal Shewale Exh.31.

14. There is another piece of evidence which also suggests that accused must have come to his house on Monday as stated by witness Surekha . It has come on record from evidence of complainant Tanaji B. Jadhav that on 11th June he was informed by Arjun that accused had been to his house and had given threat to deceased Kusum and she had sent a message to Tanaji Jadhav that he should visit the house of Kusum. It is pertinent to note that this statement of Tanaji Jadhav is not at all challenged in the cross examination and as such non examination of Arjun would not make any difference. Thus we find that in the instant case the circumstances are such that they lead to irresistible conclusion that death must have been caused by the accused. It is pertinent to note

that firstly the witness Surekha had said that on that day morning her father and mother were in the house when she left the house for going to barber. Secondly when she returned and tried to enter the house, her father-accused did not allow her to enter the house. On the contrary we find that at that time he made a total false statement that deceased has gone to field. Such false statement on behalf of the accused to Surekha also shows his guilty mind. The witness Surekha has stated that when she made enquiry about her mother at that time the accused had come just from kitchen and she had noticed that he was sweating. She therefore asked as to why he was sweating and he told that he finished his meal and as such there was sweating. In fact such enquiry on the part of child witness rather appears to be improbable but that by itself will certainly not lead us to the conclusion that whatever she has deposed is totally false. It is also true that there is such improvement with regard to sweating but that by itself is certainly not fatal to the prosecution. Similarly, there is also improvement with regard to the statement that at the relevant time she had seen the accused running towards nala, as such statement has not been made before the Police but it must be noted that there is sufficient evidence to show that when

she returned home within short time she found that house was latched from outside and at that time she had atleast seen the accuse going away from the said place or that he was not at the place of his house. Then we find that when they returned from the field and entered the house they noticed the dead body of Kusum. So, taking into consideration this sequence of events and the time gap between each event it is very clear that the evidence of last seen together in the instant case clearly indicates that within all human probabilities the act must have been done by the accused.

15. There is another circumstance which lends support to the prosecution version. In the instant case we find that there was definitely motive to commit the crime. It has come in the evidence of Surekha as well as Tanaji that relations between Kusum and accused had become strained on account of the fact that accused was suspecting that Kusum was having illicit relations with Raghunath, cousin brother of accused, who was residing adjoining to the house of accused. It is pertinent to note that even the accused has admitted in his statement under Section 313 of Cr.P.C. that he had such suspecision. It is needless to say that when the husband is having such type of suspecision there

must be animus against wife. Besides this it has also come on record that accused had sold land admeasuring about 11 gunthas without the consent of Kusum and it was not liked by Kusum and for that purpose she had even issued a public notice showing her disapproval about the transaction. This had happened some time in the year 1989. It was therefore tried to be suggested that when the period of about 2 years had lapsed and when accused had already left the house for a period of about 5 months, there was no reason for him to come all off a sudden and commit this act. However it must be noted that when the accused was fade up with the behaviour of the deceased wife and as a result of her conduct compelled to leave the house and such miserable condition had arisen because of the deceased Kusum, accused must be having animous against her.

16. The third circusmtance which can be read against the accused is that he was absconding after the incident dated 13-6-1991. The accused is arrested on 16-6-1991 in the evening at Karad. It is already mentioned above that accused had been to Shewalwadi on 10-6-1991 i.e. on Monday. He was also in the house on 13-6-1991 in the morning but was not seen at that place immediately after the

incident. It is pertinent to note that husband was not at all contacted by any of the family members. If really the incident in question would not have been done by the accused then normally even if the accused had left the house the members of the family would have atleast contacted him informing that his wife has expired. Admittedly the accused was not present after the incident. So it is very clear that since the incident he was absconding. A.P.I. Shaikh has stated that he searched for the accused but he was not found. It is correct that a person is said to be absconded when he is not traced at his permanent place of abode. In the instant case we find that the accused was in fact not having any permanent place abode after he left Shewalwadi. It has come on record that accused was staying at different places. Naturally API.Shaikh had searched various places for accused, but he was not traced. Under such circumstances it must be held that after the incident the accused was absconding.

17. The learned Advocate for the accused vehemently argued before us that in the instant case if really Kusum would have been killed by throating then normally there would have been some injuries on the perspon of the accused. But in the

instant case there is no such evidence. Firstly, it must be mentioned that accused has been traced three days after the incident. Secondly, it is not the case of the prosecution that when he was arrested there were any injuries. So under such circumstances there was no necessity to send the accused for medical examination. Besides this it must be noted that deceased Kusum was a wife of accused. naturally she must be under influence of accused. The accused has killed her by throating. It is not necessary that in such type of killing there would be necessarily injuries on the person of the accused. It is true that it has come in evidence that bangle pieces were found in the house, thereby suggesting that some resistance might have been made by deceased Kusum but merely from that we cannot jump to the conclusion that accused must have sustained injuries. Incidentaly it must also be noted that even witness Kamal Exh.31 has also stated that 15 minutes prior to Surekha’s arrival she had heard the voice "Aie ga" of deceased Kusum. Howwevr, no much importance can be given for this statement of Kamal,particularly when we find that all other evidence is sufficient and unerringly point out the guilt of accuse.d In the instant case child witness Surekha is a witness of truth and not of imagination. There is nothing

even to indicate that she was tutored or got up witness. There is no reason why she should depose against her father. We, therefore, feel that learned Additional Sessions judge has rightly appreciated the evidence on record and has correctly held that prosecution has proved that accused has committed the offence in question. We, therefore, feel that there is no necessity to interfere with the said finding.

18. Hence the appeal is dismissed.

. At this stage the learned Advocate for the Appellant-accused submitted that time be granted to surrender. Hence the Appellant-accused to surrender his bail within four weeks from today.

(S. S. PARKAR,J.)

(S. R. SATHE, J.)

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CORAM:S.S.PARKAR AND
S.R.SATHE,JJ.
DATED:10th Sept. 2004

P.C.:-

. For the reasons recorded separately in Oral judgment, the Court passes the following order :-

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Additional Sessions Judge, Satara has rightly appreciated the evidence on record and has correctly held that the accused has committed an offence in question. We, therefore, feel that there is no necessity to interfere with the said finding. Hence the appeal is dismissed.

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(S. S. PARKAR, J)

(S. R. SATHE, J)